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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-767

UNITED STATES OF AMERICA, APPELLANT

v.

THE CONNECTICUT NATIONAL BANK, THE FIRST NEW HAVEN NATIONAL BANK, AND JAMES E. SMITH, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (J.S. App. A, pp. 1a-103a) is reported at 362 F.Supp. 240.

JURISDICTION

The judgment of the district court (App. 2584-2585) was entered on July 16, 1973. The United States filed a notice of appeal to this Court on Sep-

tember 12, 1973 (App. 2586). Probable jurisdiction was noted on January 7, 1974 (App. 2587). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act (15 U.S.C. 29). *United States* v. *Phillipsburg National Bank*, 399 U.S. 350; *United States* v. *First Nat. Bancorporation*, 410 U.S. 577.

QUESTIONS PRESENTED

Whether the consolidation of the fourth and eighth largest banks in Connecticut may substantially lessen competition, in violation of Section 7 of the Clayton Act:

(a) by eliminating the two banks as significant potential entrants into each other's markets in metropolitan Bridgeport and New Haven and into other local banking markets in Connecticut;

(b) by stimulating other mergers and by intensifying the trend toward banking concentration in the state as a whole.

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any

> line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 5(B) of the Bank Merger Act of 1966, 80 Stat. 8, as amended, 12 U.S.C. 1828(c)(5)(B), provides in pertinent part:

> The * * * [Comptroller of the Currency] shall not approve * * * any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

STATEMENT

The United States brought this civil antitrust action under Section 7 of the Clayton Act (15 U.S.C. 18) challenging the proposed merger between the Connecticut National Bank ("Connecticut National") and the First New Haven National Bank ("First New Haven"), which are, respectively, the fourth and eighth largest commercial banks in Connecticut. The

complaint alleged that the merger would eliminate Connecticut National as a significant potential competitor in the New Haven metropolitan area and First New Haven as a significant potential competitor in the Bridgeport metropolitan area; reduce the number of Connecticut banks capable of expanding statewide independently; and trigger other mergers between leading banks in Connecticut, thus contributing to increased concentration of statewide banking resources and promotion of parallel policies among leading banks in local Connecticut markets (App. 10-11).[1]

After trial the district court held that the merger did not violate Section 7 and dismissed the complaint.

A. THE STRUCTURE OF BANKING IN CONNECTICUT

1. *Economic structure.* Commercial banking in Connecticut is highly concentrated.[2] At the end of 1971,

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[1] The complaint also alleged that the merger would eliminate actual competition between the banks in a four-town area adjacent to Bridgeport and New Haven (App. 10-11). The district court rejected this contention (J.S. App. A, pp. 89a-91a). It is not an issue in this appeal.

[2] There are other kinds of financial institutions in Connecticut, but the services which they may offer to the public are limited by law. Savings banks are the principal thrift institutions and lenders on real property in the state (J.S. App. A, p. 14a; App. 1793, 1795); they also have limited powers to make personal installment loans (App. 466). Under legislation enacted in May, 1973, savings banks will obtain by December 31, 1975, the right, subject to protective provisions for small-town commercial banks, to offer personal non-interest-bearing checking accounts (J.S. App. A, p. 16a; App. 2555-2563). Savings and loan associations also operate in Connecticut,

the five largest banks had 61 percent, and the ten largest banks had 83.1 percent, of the $5,678,553,000 in deposits in the state (App. 1598). This degree of concentration reflects a relatively recent increase in banking concentration in Connecticut. The percentage of deposits held by the top five banks increased from 46.4 percent in 1954 to 61 percent in 1971; and the percentage share of the ten biggest banks rose in the same period from 57.8 percent to 83.1 percent (App. 1598).

Concurrent with the increase in concentration since 1954 was a decrease in the number of commercial banks. One hundred five banks operated in 1955, but 65 banks were subsequently eliminated by merger, and by 1971 only 63 banks were in business in Connecticut (App. 1597).[3] Most of these acquisitions were made by larger banks (App. 1553-1558). Although all but three of the acquisitions between 1955 and 1968 were of small banks (with deposits of less than $30 million), more recent mergers have involved some of the largest banks in the state.

Thus, in 1968 Connecticut Bank & Trust Company of Hartford ("CBT"), then the state's second largest bank, attempted to acquire Connecticut National; a government antitrust suit caused abandonment of

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offering savings accounts and making loans on real estate mortgages (J.S. App. A, p. 14a).

[3] During the same period, 23 new banks began operations (App. 1597).

the merger.[4] In 1970 the Fairfield County Trust, which had deposits of $321,000,000, merged with the Union and New Haven Trust, which had deposits of $116,000,000, to form Union Trust, the state's third largest bank (J.S. App. A, p. 10a; App. 1554). In October, 1973, after the decision in this case, Union Trust and First Connecticut Bancorp., a holding company whose banks make it the state's ninth largest banking organization, sought approval from the Federal Reserve Board of their merger plan. 38 Fed. Reg. 27552.

The large banks have also expanded greatly the territory which they serve. In the early 1950's, banking in Connecticut was unofficially but effectively compartmentalized in five districts, and banks operated only fifteen offices outside the metropolitan areas in which they had their headquarters (App. 1582). By 1972, however, the districts had broken down: the ten leading banks had 217 offices outside their headquarters metropolitan areas; and two banks with headquarters in Hartford, CBT and Hartford National Bank ("Hartford National"), operated statewide (J.S. App. A, pp. 8a, 21a-22a; App. 1583-1584).[5]

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[4] *United States of America* v. *The Connecticut National Bank and The Connecticut Bank and Trust Company*, D. Conn., Civil No. 13138 (Complaint filed May 9, 1969).

[5] At year-end 1972, CBT and Hartford National held 20.9 percent and 20.4 percent of statewide deposits (App. 2554). Union Trust, the third largest bank, has 8.3 percent of statewide deposits (computed from App. 2424 and 2554).

Concentration in local Connecticut banking markets is even higher than in the state as a whole. There are eleven metropolitan areas in Connecticut,[6] but, as of June 30, 1970, in only one (Norwalk) did the top three banks have less than 80 percent of deposits in area banking offices (App. 1545, 1548, 1587-1595). In the Bridgeport metropolitan area[7] historical concentration levels have persisted: the market share of the top three banks was 86.8 percent in December, 1954, and 87.8 percent in June, 1970 (App. 1544-1545). In the New Haven metropolitan area,[8] concentration has increased markedly: the market share of the top three banks rose from 69.1 percent in December, 1954, to 83.3 percent in June, 1970 (App. 1547-1548).

2. *The structural effect of Connecticut law.* Although Connecticut banking law prohibits banks not headquartered in Connecticut from operating banking offices within the state,[9] it permits any Connecti-

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[6] The metropolitan areas in Connecticut, described by the Census Bureau as Standard Metropolitan Statistical Areas ("SMSAs"), are: Bridgeport, Bristol, Danbury, Hartford, Meriden, New Britain, New Haven, New London-Groton-Norwich, Norwalk, Stamford and Waterbury (App. 1440-1441).

[7] The Bridgeport SMSA includes: Bridgeport, Easton, Fairfield, Milford, Monroe, Shelton, Stratford, and Trumbull (App. 1440).

[8] The New Haven SMSA includes: New Haven, Bethany, Branford, East Haven, Guilford, Hamden, North Haven, North Branford, Orange, West Haven, and Woodbridge (App. 1441).

[9] See Conn. Gen. Stat. Ann., §§ 36-59 and 36-418 to 36-430; and 12 U.S.C. 36 and 1842(d).

cut banks to merge. It also allows banks to establish a *de novo* branch in any town where another bank does not already have its headquarters (J.S. App. A, p. 7a). Subject to this "home-office-protection" provision, banks may branch statewide. At the time of the challenged merger, the cities of Bridgeport and New Haven were "closed" to branching by outside banks, but many of their suburbs were "open" because no banks had headquarters there.[10]

3. *Connecticut's growth in population and wealth.* In the last three decades Connecticut has enjoyed a sustained population growth, occurring principally in suburbs like those in the Bridgeport and New Haven metropolitan areas. Between 1950 and 1969 Connecticut's population grew from 2,016,000 to 3,012,000, an increase of 49 percent which exceeded the national average and was the highest percentage increase of the New England states (App. 1464).

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[10] In the New Haven metropolitan area, New Haven, Orange, Woodbridge, Hamden, North Haven and North Branford were closed to *de novo* branching at the time of the merger; and East Haven, West Haven, Branford, Guilford, and Bethany were open (App. 1505). Closed towns in the Bridgeport metropolitan area were Bridgeport and Stratford; open towns were Milford, Fairfield, Trumbull, Monroe, Shelton and Easton (App. 1505). The opening after trial of a new state-chartered bank in Monroe has closed that town to branching. Also after trial state banking authorities granted provisional authority for new banks to be opened in Bridgeport, Trumbull and Shelton, and the Comptroller gave similar authority for a new national bank in Fairfield. These new charters close the towns in question to *de novo* branching. But see pp. 49-51, *infra*.

Connecticut presently ranks first in the nation in per capita income and per capita value added by manufacture, and second in per capita effective buying power (App. 2568, 2214). The state's economic prospects are good: it is estimated that by 1990 Connecticut's population will have risen to 4,313,000 and its per capita income will have increased from $4,239 to $7,106 (App. 1464, 1467).

The Bridgeport and New Haven metropolitan areas have shown good growth, which is expected to continue in the coming years. Between 1950 and 1970 suburban population practically doubled, increasing the population of the Bridgeport metropolitan area from 275,888 to 389,153, and the New Haven metropolitan area from 273,049 to 355,538 (App. 1456, 1457).[11] Projections for each metropolitan area point to continued growth, with significant increases expected in population, employment and personal income.[12]

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[11] The population of Bridgeport's suburbs rose from 117,179 in 1950 to 232,611 in 1970; at the same time, the population of Bridgeport city declined from 158,709 to 156,542 (App. 1456). The population of New Haven's suburbs increased from 108,606 in 1950 to 217,831 in 1970; during those years the population of New Haven city fell from 164,443 to 137,707 (App. 1457).

[12] By 1980 the population of the Bridgeport metropolitan area is expected to be 471,000 and that of the New Haven metropolitan area to be 406,000 (App. 1474). Civilian employment in the Bridgeport area is expected to have risen from 164,000 in 1968 to 199,000 in 1980, and in the New Haven area from 166,200 to 205,900 (App. 1475). Total personal income is expected to climb from $1,412,100,000 to $2,490,900,000 in the Bridgeport area and from $1,459,700,000 to $2,544,500,000 in the New Haven area (App. 1477).

B. THE MERGING BANKS

Connecticut National is the largest commercial bank with headquarters in the Bridgeport metropolitan area and the fourth largest commercial bank in Connecticut (J.S. App. A, pp. 1a-3a). At year-end 1972 it had $412 million in deposits, which were 6.2 percent of deposits in commercial banks in Connecticut (App. 2554).[13] As of June 30, 1970, it held 40 percent of commercial bank deposits in the Bridgeport metropolitan area, the largest share (App. 1545).[14]

Connecticut National operates 51 offices, of which 25 are in the Bridgeport metropolitan area, and 20 are in the Danbury, New Haven, Norwalk, Stamford, and Waterbury metropolitan areas (App. 1545, 1548, 1587, 1588, 1590, 1592, 1816-1817). The bank expanded substantially in the decade and a half prior to the merger. In 1955 Connecticut National operated only one branch outside the Bridgeport metropolitan area (App. 1582). Between 1955 and 1971 it established 34 *de novo* branches—more than any other bank in the state (App. 1561-1562); seventeen of these branches were outside the Bridgeport metropolitan area. In the same period it ac-

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[13] Its total assets were $463.3 million (J.S. App. A, p. 3a).

[14] Connecticut National's share of the Bridgeport area market has consistently been high; in 1954, for example, it was the market leader with a 47.4 percent share (App. 1544).

quired four banks, all of which were outside the Bridgeport area (App. 1555).[15]

Connecticut National also became more profitable. While its total resources increased from approximately $216 million in 1961 to nearly $399 million in 1970, its net income[16] rose from $1,279,791 to $3,757,796 (App. 1837).

First New Haven is the second largest commercial bank with headquarters in the New Haven metropolitan area, and the eighth largest bank in Connecticut (J.S. App. A, pp. 1a, 3a-4a). At year-end 1972 it had $272 million in deposits, which were 4.1 percent of deposits in commercial banks in Connecticut (App. 2554). As of June 30, 1970, First New Haven had 39.5 percent of deposits in commercial bank offices in the New Haven metropolitan area, the largest share (App. 1548).[17]

First New Haven operates 22 offices, of which 17 are in the New Haven metropolitan area and three are in the Bridgeport metropolitan area (J.S. App. A, p. 4a; App. 1853, 1872-1873).[18] The bank ex-

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[15] The banks acquired and their deposits size were: First National Bank in Westport, $4,034,000; Waterbury Trust Co., $15,571,000; City National Bank of South Norwalk, $14,470,000; and Atlantic National Bank of Stamford, $16,639,000 (App. 1555).

[16] "Net income" refers to net income before securities gains or losses.

[17] First New Haven's share of the New Haven area market has consistently been high: in 1954, for example, it was the market leader with a 31.5 percent share (App. 1547).

[18] Two offices are in towns—Derby and Wallingford—that are not in any metropolitan area.

panded appreciably in the years prior to the merger. First New Haven established 14 *de novo* branches between 1955 and 1971 (App. 1562). At the same time it acquired three banks (App. 1556).[19] As with Connecticut National, increasing size brought First New Haven greater profitability; assets grew from approximately $168 million in 1961 to $315.2 million in 1970, while net profits rose from $1,098,512 to $3,043,756 (App. 1884).

C. THE PROCEEDINGS

1. *Agency Reports and the Comptroller's Decision.* On November 19, 1970, Connecticut National and First New Haven signed a Consolidation Agreement which on February 2, 1971, they submitted to the Comptroller of the Currency for approval (J.S. App. A, p. 4a; App. 2209). The Comptroller, as required by the Bank Merger Act of 1966 (12 U.S.C. 1828 (c)(4)), requested the opinions of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Department of Justice.

The Board of Governors stated that the merger would eliminate the "potential for increased competition between the two banks" and reduce by one the number of banks capable of expanding statewide, and thus it concluded that "[o]verall, the competitive

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[19] The banks acquired and their deposits were: Milford Trust Co., $12,977,000; The New Haven Bank, N.B.A., $43,024,000; and Branford Trust Co., $5,107,000 (App. 1556).

effect of the proposed consolidation would be substantially adverse" (App. 1631, 1632, 1633). The Federal Deposit Insurance Corporation, believing that the merger would eliminate potential competition between the banks and encourage the concentration of banking statewide, also concluded that the "proposed transaction would have a substantially adverse effect on commercial bank competition * * * *" (App. 1629). The Department of Justice reported that the merger "would have a significantly adverse effect on competition" (App. 1622).

The Comptroller approved the merger on July 26, 1971 (App. 2566-2572).

2. *The District Court's Decision.* On August 23, 1971, the United States filed its complaint challenging the merger (App. 3). Pursuant to 12 U.S.C. 1828(c)(7)(A), this automatically stayed the merger. The Comptroller intervened as a party defendant (App. 18). 12 U.S.C. 1828(c)(7)(D).

After trial, the district court held that the merger would not violate Section 7 (J.S. App. A, pp. 1a-103a).[20]

The court held that the line of commerce in this case "includes both commercial banks and savings banks" (J.S. App. A, p. 87a), because it found meaningful competition between both types of banks for personal checking accounts, real estate mortgages,

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[20] Entry of judgment dismissing the complaint followed on July 16, 1973 (App. 2584-2585). Because of the unusual length of the district court's findings (J.S. App. A, pp. 1a-80a), there has been no attempt to summarize them here.

personal loans, IPC deposits, and commercial loans (J.S. App. A, p. 85a).[21]

The court then ruled that the State of Connecticut is the only appropriate "section of the country" in which to test the effects of the merger (J.S. App. A, pp. 89a, 92a), and that the government had failed to prove that metropolitan areas are appropriate sections of the country (J.S. App. A, pp. 88a-89a).[22]

The court determined that the merger would not substantially lessen actual competition because, after reducing the more-than-11 percent statewide market share of the two banks,[23] the merger would increase the concentration level of the state's ten largest commercial banks less than 1.8 percent (J.S. App. A, p. 96a).[24]

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[21] The court also cited this Court's finding of overlapping competition in *United States* v. *Continental Can Co.*, 378 U.S. 441, and the omission from the Bank Merger Act of the phrase "in any line of commerce" (J.S. App. A, p. 86a).

[22] The court also cited the absence of any showing of the percentage of metropolitan area residents who bank in that metropolitan area; the fact that 43 percent of Connecticut National's deposits come from outside the Bridegport metropolitan area; and prior adverse precedent (J.S. App. A, pp. 88a-89a).

[23] The reduction was to account for the influence of New York City banks (J.S. App. A, p. 96a).

Year-end 1971 figures, which the court used, show that Connecticut National had 6.6 percent and First New Haven had 4.7 percent of statewide deposits—hence a combined share of over 11 percent (App. 1550).

[24] The court found that with savings banks included, the merger increased the combined share of the five largest banks 0.9 percent (J.S. App. A, p. 96a).

The court also found no likely loss of substantial potential competition. Successful entry into either the New Haven or Bridgeport metropolitan area, according to the court, required entry into the cities of Bridgeport or New Haven (J.S. App. A, p. 99a). Entry by branching was not possible, it held, because both cities are closed to branching (J.S. App. A, p. 99a).[25] It ruled that toehold entry into the city of New Haven was impossible because there are no banks suitable for such acquisition there, and that the government had failed to identify any small banks for sale in Bridgeport and other towns (J.S. App. A, p. 101a). It held that economic, legal, and regulatory barriers made entry into these cities by use of a holding company to charter a new bank unfeasible (J.S. App. A, p. 100a). Statewide expansion by branching was not probable, according to the court, because of the banks' lack of sufficient financial resources and the limited availability of economically attractive open towns (J.S. App. A, p. 100a). The court also rejected the government's claim that this merger would trigger other mergers, since it concluded that regulatory and antitrust criteria will be applied case-by-case (J.S. App. A, p. 101a).

Finally, the court found that the merger's benefits to the convenience and needs of the community would clearly outweigh any harm to competition by enabling the new bank to compete statewide with the two big

[25] The court stated that branching into the suburbs to any significant extent would not receive the approval of the Comptroller of the Currency; and that the defendants also lacked the intention to enter each other's service area by branching (J.S. App. A, pp. 99a-100a).

Hartford banks, and by offering their customers new services (J.S. App. A, p. 102a).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a merger between two of the largest commercial banks in Connecticut: Connecticut National, whose main office is in Bridgeport, and First New Haven, whose main office is some twenty miles away in New Haven. In the government's view, the record shows that the merger eliminates significant potential competition in commercial banking in the New Haven and Bridgeport metropolitan area markets and in the other local markets in Connecticut. Even under the district court's conclusion, which we question, that the State of Connecticut is the only market, this merger eliminates substantial actual competition.

I

This Court in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, and *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, recognized that the broad cluster of banking services known as "commercial banking" is a line of commerce even though commercial banks may compete with thrift institutions in providing such services as savings accounts, personal loans and real estate mortgages. Thus, the competition which savings banks in Connecticut offer commercial banks in these discrete and limited services provides no ground for rejecting commercial banking as a line of commerce. The district court's findings of significant cross-institutional competition for commercial and industrial loans and demand de-

posits do not change matters, for those findings are clearly erroneous. Such competition is either nonexistent or insubstantial.

II

The Bridgeport and New Haven metropolitan areas are each areas in which both buyers and sellers of banking services can conveniently operate. Thus, under the market definition principles enunciated by this Court in *United States* v. *Philadelphia National Bank*, *supra*, they are relevant sections of the country in which to test the effects of this merger. The district court's failure to recognize them as sections of the country stems principally from a market analysis that mistakenly focuses only on the sellers of banking services. That same error caused the district court to conclude that the State of Connecticut is a banking market and the only relevant section of the country. We submit that because of the insulating effects of Connecticut law, the whole state is a section of the country, although it is not a banking market nor the only relevant section of the country, as the district court found.

III

Judged by the objective criteria of incentive, prospects for success, and financial capability, Connecticut National was a potential entrant into the New Haven area market, and First New Haven was a potential entrant into the Bridgeport area market. Each bank had ample incentive to enter the markets, because these markets have been economically sound in the past and have good prospects for the future.

Further incentive came from the need to compete more effectively with the two large Hartford banks, each of which had recently entered the Bridgeport and New Haven markets.

Prospects for entry were good through either *de novo* branching or toehold acquisition. Connecticut law allows acquisition statewide, and in each market there were several banks suitable for toehold acquisition. Connecticut allows *de novo* branching statewide, subject to the limitations of the Home Office Protection Law. Although the cities of Bridgeport and New Haven were closed to branching, several other towns in those markets were open. Approval by the Comptroller of the Currency would be necessary for either type of expansion, but the Comptroller has regularly approved acquisitions and *de novo* branching in Connecticut. In addition, Connecticut permits bank holding companies, which thus form a third method of entry.

Entry was financially possible because the banks are large, strong and profitable. They established many branches and made several acquisitions in the past when they were smaller and less profitable. Modest but competitively significant entry is all the more possible when, as now, Connecticut National and First New Haven are larger and stronger.

IV

The merger has severe anticompetitive effects. Each bank has the incentives, prospects for success, and financial capability to be a significant potential competitor in the metropolitan area where the other is headquartered. This merger will eliminate that competition. Each bank is a significant potential competi-

tor in those other local banking markets in Connecticut where it does not now compete. The merger will also eliminate or reduce that competition. Moreover, the merger is very likely to trigger mergers among other large Connecticut banks—thus further increasing concentration and spreading the anticompetitive effects of the merger statewide.

In addition to the principles of potential competition, the traditional doctrine of elimination of actual competition provides an alternative and narrower ground for resolution of the case. The district court found that the State of Connecticut is a banking market and the only relevant section of the country. We agree that the state is a section of the country for purposes of Section 7, although we do not think that it is the only section or that it can be characterized as a traditional customer-supplier banking market. If, however, this Court accepts the market as defined by the district court, it should treat the merger as one between actual competitors. As such it is illegal because it significantly increases concentration in an already concentrated market. *United States* v. *Philadelphia National Bank, supra; United States* v. *Von's Grocery Co.*, 384 U.S. 270; and *United States* v. *Pabst Brewing Co.*, 384 U.S. 546.

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The anticompetitive effects of the acquisition are not outweighed by the special defense created by the Bank Merger Act of 1966, 12 U.S.C. 1828(c)(5)(B), the effect of the merger in meeting "the convenience and needs of the community to be served." Since the district court did not properly determine the competitive effects, it could not properly balance

them against the benefits claimed for the merger. That evaluation cannot be made on an abstract, assumed hypothesis of adverse competitive effects.

Moreover, the benefits found by the court are insufficient to establish the defense. It is not satisfied by the claim that the merged bank could compete more effectively with the two large Hartford banks elsewhere in Connecticut. Such a test would lead rapidly to domination of banking markets by a few large organizations, a purpose never contemplated by Congress. The other benefits claimed, such as increased lending limits and the ability to provide sophisticated services, aid only a minute portion of the banks' customers rather than the entire community of users of banking services, for whose benefit the defense is designed.

I. THE DISTRICT COURT ERRONEOUSLY HELD THAT COMMERCIAL BANKING IS NOT A LINE OF COMMERCE IN CONNECTICUT

The district court ruled that "the appropriate 'line of commerce' in the Connecticut banking environment includes both commercial banks and savings banks" (J.S. App. A, p. 87a). Its principal reason for combining these two types of financial institutions in one line of commerce was its conclusion that commercial banks and savings banks engage in substantial competition for savings accounts, real estate mortgages, personal loans, commercial loans and checking accounts (J.S. App. A, p. 85a). We submit that in so ruling, the district court misapprehended both this Court's prior decisions and the record in this case.

1. In *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (*"Philadelphia National Bank"*), this Court recognized that the cluster of banking services which make up "commercial banking" constituted a line of commerce. *Id.* at 356-357. The Court was aware that the merging commercial banks faced competition from savings banks and savings and loan associations for certain kinds of banking business: savings accounts, installment loans, and real estate loans. *Id.* at 357, n. 34; *United States* v. *Philadelphia National Bank*, 201 F. Supp. 348, 362 (E.D. Pa.). Nonetheless, it held that significant competition between commercial banks and thrift institutions in limited and discrete aspects of banking—which might themselves be lines of commerce—could exist without nullifying as a line of commerce the broader range of banking services clustered only at commercial banks. *Philadelphia National Bank, supra*, 374 U.S. at 356-357.

In *United States* v. *Phillipsburg National Bank*, 399 U.S. 350 (*"Phillipsburg"*), this Court emphasized again the importance of commercial banking as a line of commerce to test the competitive effect of a merger between commercial banks. The district court seemingly had rejected commercial banking as a line of commerce and had focused instead on particular services. *United States* v. *Phillipsburg National Bank & Trust Co.*, 306 F. Supp. 645, 648-649 (D. N.J.). This Court, however, stressed that the existence of submarkets like savings accounts and real estate loans, in which the defendants competed with savings and

loan associations,[26] was "not a basis for the disregard of a broader line of commerce that has economic significance." *Phillipsburg, supra*, 399 U.S. at 360. Pointing to the cluster of services uniquely available at commercial banks, the Court reaffirmed the validity of commercial banking as a line of commerce. *Id.* at 360-361.

Both Connecticut National and First New Haven are commercial banks and offer the cluster of services subsumed under the heading "commercial banking." The fact that they also compete with savings banks for savings, personal loans and real estate mortgages, though it may be evidence of a particularized product sub-market that crosses institutional lines,[27] is no

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[26] Although there may have been no savings banks in the area, there were savings and loan associations. *United States* v. *Phillipsburg National Bank & Trust Co.*, 306 F. Supp. 645, 649 (D. N.J.). Indeed, savings and loan associations were economically significant in both New Jersey and Pennsylvania: at the time of the merger involved in *Phillipsburg*, savings and loan associations in each state had savings capital in excess of $5 billion. Federal Home Loan Bank Board, *Member Savings And Loan Associations Of The Federal Home Loan Bank System, Combined Financial Statements 1968*, pp. 15, 16.

[27] In *Phillipsburg*, this Court while upholding the validity of commercial banking as a line of commerce, also observed that "[s]ubmarkets such as the District Court defined would be clearly relevant, for example, in analyzing the effect on competition of a merger between a commercial bank and another type of financial institution." *Phillipsburg, supra*, 399 U.S. at 360. Thus in *Fort Worth National Corp.* v. *Federal Savings & Loan Ins. Corp.*, 469 F. 2d 47, 58-60 (C.A. 5), it was held that savings deposits under $100,000 were an appropriate line of commerce to test the effects of a merger between a commercial

more reason to ignore the broader commercial banking market as a valid line of commerce than it was in *Philadelphia National Bank* and *Phillipsburg*.[28]

The district court's additional conclusions that savings bank compete with commercial banks for commercial loans and personal checking accounts (J.S. App. A, p. 85a) are either clearly erroneous or immaterial. The court's findings do not support its conclusion that there is competition between commercial

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bank and a savings and loan association. However, the existence of a line of commerce which cuts across institutional bounds is not inconsistent with the existence of a line of commerce expressing competition among institutions of one kind. This Court so recognized in *United States* v. *Continental Can Co.*, 378 U.S. 441, 456-458, upon which the district court improperly relied for its contrary conclusion (J.S. App. A, p. 86a).

[28] Indeed, *Phillipsburg* presented a more persuasive case for abandoning commercial banking as a line of commerce than does the present case framed in terms of competition from thrift institutions for savings, personal loans and mortgages. The two merging commercial banks in *Phillipsburg* also received competition from thrift institutions for savings accounts and real estate loans. *United States* v. *Phillipsburg National Bank & Trust Co.*, 306 F. Supp. 645, 649 (D. N.J.). Moreover, in that case the district court found that the defendants were "more comparable to savings institutions than to large commercial banks" because demand deposits accounted for less than 30 percent and time and savings deposits accounted for more than 70 percent of total deposits in each. *Id.* at 648, 649. By contrast, demand deposits account for 50.2 percent and 60.8 percent of deposits, respectively, at Connecticut National and First New Haven. Computed from Connecticut National 1972 Annual Report, p. 12, and First New Haven 1972 Annual Report, p. 7.

banks and savings banks for commercial loans.[29] Nor does the record in general buttress this conclusion: defendants' own expert witnesses admitted that savings banks were either a non-existent or an unimportant factor in commercial and industrial loans (App. 479, 641).[30]

Similarly erroneous is the district court's conclusion that savings banks compete with commercial banks for personal checking accounts. The findings cited by the district court do not establish such competition (J.S. App. A, pp. 16a-17a). In fact, as respondents recognize (Motion To Affirm, pp. 36, 39), savings banks in Connecticut do not compete with commercial banks for personal checking accounts be-

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[29] The district court relied for its conclusion (J.S. App. A, p. 85a) only upon Finding No. 45—which does not specifically mention commercial loans at all (J.S. App. A, p. 14a). The transcript reference in that finding to the government's admission that "CNB competes directly with savings banks for 79 percent of its loans" (J.S. App. A, p. 14a) shows only that commercial-industrial loans are the 21 percent of Connecticut National's loan business which is not subject to savings bank competition (App. 169-170).

[30] "Commercial and industrial loans" are short term business loans, generally for inventory or working capital (App. 479, 487). These are distinct from a real estate loan secured by commercial or industrial property (App. 487, 1793, 1795). Nonetheless, if a businessman is willing and able to mortgage his business real property, he may obtain a savings bank loan, secured only by a first mortgage, to finance inventory or working capital (App. 479, 487-488). Since these savings bank loans amounted to only $26 million compared to more than $1 billion in commercial bank commercial and industrial loans, outstanding at year-end 1971, they are not competitively significant, as savings bankers agree (App. 487, 1072).

cause they do not offer that service; they have no present authority under Connecticut law to do so.[31]

Although in May, 1973, Connecticut enacted legislation to authorize savings bank demand deposits, the effective date of the legislation is deferred and conditional, the law has not yet taken effect and it may not take effect for nearly two years (J.S. App. A, p. 17a). Connecticut Public Act No. 73-195 (May 14, 1973).[32] Thus one can only speculate about whether savings banks, when they finally begin to offer checking accounts, will provide significant competition to commercial banks for demand deposit business.[33] There is good reason to believe that they will not be significant competitors. Not all Connecticut savings banks were in favor of having checking account services, and, according to their spokesman, "[i]t is not likely that all savings banks will offer it * * *" (App. 481, 486). In two states where savings banks already have the right to offer checking accounts, New Jersey and

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[31] One Connecticut savings bank, the Savings Bank of Tolland, by dint of an unusual provision in its charter, has offered checking accounts for many years (J.S. App. A, p. 17a).

[32] The new law will take effect on the earliest of three occasions: enactment of similar federal legislation; elimination of the difference in interest rates allowed to be paid on deposits under $100,000 by savings banks and state banks not members of the Federal Reserve System; or December 31, 1975. Connecticut Public Act No. 73-195, § 7.

[33] The district court, having erroneously determined that savings banks currently compete with commercial banks for checking accounts, made no findings on what kind of competitive impact could be expected (see J.S. App. A, pp. 16a-18a).

Maryland, demand deposits amount to less than 3 percent of total savings bank deposits (App. 1785).[34]

Even more restrictive of any competitive impact from savings bank checking accounts in Connecticut is the fact that the Connecticut law will permit savings banks to accept demand deposits only from natural persons and only for personal, non-business purposes. Connecticut Public Act No. 73-195, §§ 1, 2 and 5.[35] Thus, savings banks will have no authority to offer checking accounts other than to one class of customer and for one purpose. Commercial banks, by force of law, will still have all the demand deposit business of commercial customers, whether large or

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[34] In Maryland, demand deposits amounted to only 2.05 percent of total deposits in savings banks at year-end 1971 (App. 1785). See Annotated Code of Maryland, Article II, Section 41(a). *Savings Bank of Baltimore* v. *Bank Commissioner of Maryland*, 248 Md. 461, 237 A. 2d 45. In New Jersey, where savings banks' right to hold demand deposits has been clear for several years and where nineteen out of twenty savings banks do offer checking, demand deposits account for only $99,285,000—or 2.72 percent of the $3,650,985,000 total deposits (App. 1785, 486). See *Hudson County National Bank* v. *Provident Institution for Savings*, 80 N.J. Super. 339, 193 A. 2d 697, affirmed *per curiam*, 44 N.J. 282, 208 A. 2d 409.

[35] By contrast, savings banks in Maryland may provide checking accounts both to natural persons and to legal entities, such as corporations; and the accounts may be used for either personal or business purposes. Annotated Code of Maryland, Article II, Section 41(a). In New Jersey, natural persons and legal entities (except for-profit corporations) may have savings bank checking accounts, whether for personal or business use. New Jersey Statutes Annotated, 17:9A-184.

small.[36] These demand deposits will continue to serve as a matrix of the cluster of services forming the line of commerce known as commercial banking.[37]

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[36] Although the record lacks precise figures on the extent of commercial demand deposits at Connecticut banks, it is clear that the checking accounts of business entities and individuals for business purposes are large and important. At Connecticut National's main office there are 61 demand deposit accounts larger than $100,000; these accounts, averaging $386,639 and almost certainly business accounts, total $23,585,000—or 61 percent of the total dollar value of demand deposit accounts at that office (computed from App. 1513). At First New Haven's main office, there are 79 demand deposit accounts larger than $100,000; these accounts, averaging $328,101, amount to $25,920,000—slightly more than 50 percent of the demand deposits at that office (computed from App. 1528).

Small corporations, partnerships, and individual entrepreneurs, of course, also use checking accounts, and under the new law they must continue to do their checking at commercial banks. This type of customer's checking business, which is probably best indicated by demand deposits between $10,000 and $100,000 (see, *e.g.*, App. 421-422, 574-575), is also very important to commercial banks. At Connecticut National's main office, there are 306 demand deposit accounts in this range, averaging $30,186; they amount to $9,237,000—or 24 percent of the total dollar volume of demand deposit accounts at that office (computed from App. 1513). At First New Haven's main office, there are 517 accounts of this size, averaging $29,433; they amount to $15,217,000—or 29.5 percent of the demand deposits at that office (computed from App. 1528).

[37] The district court's reliance (J.S. App. A, p. 86a) upon the omission of the phrase "in any line of commerce" from the Bank Merger Act of 1966 is erroneous. *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 182, n. 15.

II. THE BRIDGEPORT AND NEW HAVEN METROPOLITAN AREAS AND THE STATE OF CONNECTICUT ARE ALL SECTIONS OF THE COUNTRY FOR THE PURPOSES OF SECTION 7

The United States contended that the Bridgeport and New Haven metropolitan areas are sections of the country within which to test the effects of the merger on potential competition, because they are local banking markets with supply and demand characteristics like those found in *Philadelphia National Bank* and *Phillipsburg*. It also maintained that the State of Connecticut as a whole, though not a banking market, is nonetheless a section of the country, because state law limits entry into local Connecticut markets to those banks with headquarters in Connecticut. The district court held that the Bridgeport and New Haven areas are not sections of the country, and it concluded that the state as a whole is the only relevant section of the country. We agree, though for reasons different from the district court's, that the state is a section of the country within the meaning of Section 7, but we submit that the court erred both in identifying Connecticut as the only relevant section of the country, and in rejecting the Bridgeport and New Haven metropolitan areas.

A. The State Of Connecticut Is A Relevant Section Of The Country, But It Is Not The Only Relevant Section Of The Country

1. The district court's determination that the State of Connecticut is the only relevant section of the country (J.S. App. A, pp. 89a, 92a) is based upon

an analysis squarely at odds with the standards set forth by this Court in *Philadelphia National Bank.*

In *Philadelphia National Bank* the Court emphasized that because banking is a service industry in which convenience of location is very important, a banking market is the " * * * area in which the seller operates, *and to which the purchaser can practicably turn for supplies* * * *." *Philadelphia National Bank, supra,* 374 U.S. at 359 (emphasis in original). Thus, in delineating a banking market, although it is necessary to focus on the location of a bank's offices, that is only half the task. It is also necessary to examine the proximity to bank offices of "customers that are neither very large nor very small." *Id.* at 361. This the district court failed to do.

The court found that Connecticut National and First New Haven, like the other major banks in Connecticut, price systemwide: *i.e.*, each bank charges the same price for services at all its branches (J.S. App. A, p. 21a). It also found that the two big Hartford banks, CBT and Hartford National, operate to a substantial degree within the service areas of the defendants (J.S. App. A, pp. 21a-22a). From these findings the court reasoned that defendants' prices are responsive to the competition of the Hartford banks, and thus it concluded that competitive pressures flow throughout the state, obliterating any local markets and establishing one statewide market (J.S. App. A, pp. 92a, 21a-24a).

Even if this analysis were a complete and accurate picture of seller behavior and were sound economics,[38] it would still be legally insufficient under *Philadelphia National Bank, supra,* to establish that the state as a whole is the only relevant section of the country. Proper banking market definition requires the district court to consider not only the area where the sellers of banking services operate, but also the area to which the buyers of those services can conveniently turn. *Id.* at 359. The district court made no findings that the customer who is neither very large nor very small can conveniently use banking offices all over the state. Nor is there anything in the record which shows that most customers can practicably go from, say, New London to Waterbury, or from Stamford to Hartford, to do their banking. The district court simply ignored the convenience of these bank customers. By focusing solely on the banks and neglecting those who purchase their services, the district

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[38] Even if a bank prices system-wide, it may still vary service from branch to branch. First New Haven, according to its president, has "different evening hours all through our system" (App. 923). Similarly, various of its competitors keep certain offices open on Saturday (App. 1702-1703). The district court ignored this evidence of service competition.

Furthermore, the court's finding of system-wide pricing does not negate the significance of local markets. A bank which prices system-wide will set its price to maximize its profits system-wide; and in so doing it will be most seriously affected by competition in the markets where it has the most business and where concentration is highest (App. 359-360). For the defendants, such areas are the Bridgeport and New Haven metropolitan areas.

court performed only half the market analysis which *Philadelphia National Bank* requires.

2. Although the State of Connecticut is not a banking market as defined by the criteria of *Philadelphia National Bank*,[39] it is nonetheless a "section of the country" within which it can meaningfully be said that the merger may substantially lessen competition. To be sure, a banking market will always constitute a "section of the country," and thus the Bridgeport and New Haven metropolitan areas, which are banking markets (see pp. 34-43, *infra*), are sections of the country. But a geographic area need not be a banking market to be a section of the country. Section 7, after all, speaks not of "markets" but of "section[s] of the country." And, as this Court has held, the purpose of defining a "section of the country" is to focus on the geographic area where the merger will have a significant impact on competition. *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549-550. We submit that the anticompetitive effects of this merger transcend the harm done to potential competition in the Bridgeport and New Haven metropolitan areas, and, because of the way in which Connecticut law has shaped banking structure, reach to the state as a whole.

Connecticut law forbids any bank which does not have its headquarters in Connecticut from operating

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[39] This is not to say that the state could not constitute a banking market for specialized banking services or for very large customers of commercial banking.

banking offices within the state.[40] Thus the law insulates the state from entry by outside banks,[41] and the boundaries of the state define the area within which any potential entrant into a local Connecticut banking market is to be found. It also means that Connecticut banks, which, subject to home office protection, may branch statewide, have no place to direct their expansion but within the state.[42]

Since local banking markets in Connecticut, as in most other states, are highly concentrated,[43] significant potential entrants into local markets are very important. First, by their independent entry they are likely to stimulate competition, for only by hard competition can they enlarge their initially small market shares and win business from the dominant banks. Second, the addition of new firms provides

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[40] Conn. Gen. Stat. Ann., § 36-59(4) provides: "No foreign banking corporation, except a national banking association having its main office in this state, shall maintain any office within the state to solicit deposits or to conduct a general banking, a savings banking or a banking and trust business." Federal law dovetails with this state statute: 12 U.S.C. 36. Bank holding companies operate under similar strictures. See Conn. Gen. Stat. Ann., §§ 36-418 to 36-430; and 12 U.S.C. 1842(d).

[41] This does not prohibit out-of-state banks from soliciting Connecticut residents through salesmen and mass media to do their banking at offices located in another state. See, *e.g.*, J.S. App. A, pp. 25a-27a.

[42] Connecticut permits its banks to branch only within Connecticut. See Conn. Gen. Stat. Ann., § 36-59.

[43] As pointed out above (p. 7, *supra*), in ten out of the eleven metropolitan areas in Connecticut the top three banks have market share of at least 80 percent.

customers with new alternatives and increases the likelihood that in the long run banks in the market will compete rather than cooperate."

The pool of significant potential entrants is small, however, for it is limited to those Connecticut banks with the capacity and incentive for major expansion. There are, at most, ten banks in Connecticut which have the potential to operate statewide (App. 140-144). Since two of the ten, CBT and Hartford National, for all practical purposes already operate statewide (J.S. App. A, pp. 21a-22a), only eight such banks exist—Connecticut National and First New Haven among them—and this merger will eliminate one of them. Thus the effect of a merger which eliminates even one of these banks will be felt statewide, for it will have an impact in every local market in the state where that bank does not currently operate but which it might otherwise enter.

The effect on competition is even greater when that merger is part of a trend among large banks, for it is likely to trigger other "defensive" mergers which further concentrate banking.[45] As we have pointed out, in recent years there have been mergers involv-

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[44] Cooperation is more difficult the larger the number of persons whose cooperation is necessary.

[45] The fact that mergers are subject to regulatory and judicial scrutiny does not, as the district court thought (J.S. App. A, p. 101a), render triggering unlikely. Under the district court's analysis, which favors the merger so as to permit the consolidated banks to compete against the Hartford banks (*id.* at p. 102a), other large banks are encouraged to merge.

ing some of the state's largest banks. And after the decision of the district court, the third and ninth largest banks in Connecticut submitted a merger to the Federal Reserve Board for approval (see p. 6, *supra*). Other large banks in Connecticut are also likely to consider "defensive" mergers.

Such a pattern of mergers will produce a statewide banking structure in which each local market is not only a tight oligopoly, but is an oligopoly of the same firms. The local oligopolies in each market may become linked, in that the same banks, unaffected by fear of outside entry, may engage in more standardized and hence less competitive business behavior in all the state's markets, rather than risk retaliation by departing from such standards in any locality.[46]

B. The Bridgeport And New Haven Metropolitan Areas Are Banking Markets And Hence Are Sections Of The Country For The Purposes Of Section 7

The government contended that the Bridgeport and New Haven metropolitan areas are banking markets and thus are sections of the country. The district

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[46] See, Solomon, *Bank Merger Policy and Problems: A Linkage Theory of Oligopoly*, 89 The Banking Law Journal 116, 119 (1972); Wille, *FDIC Merger Policy, 1970-1972*, Presentation at the Practicing Law Institute Seminars on Bank Acquisitions and Mergers and Other Antitrust Problems, New York, New York, October 13-14, 1972, FDIC News Release, pp. 28-32. See also Yeats, *An Analysis of the Effect of Mergers on Banking Market Structures*, Journal of Money, Credit, and Banking, p. 623 (May 1973); and *Recent Changes in the Structure of Commercial Banking*, Federal Reserve Bulletin, March 1970, pp. 205, 210.

court did not question the accuracy or relevance of the government's proof, but it nonetheless concluded that the United States had failed to carry its burden of proof (J.S. App. A, pp. 88a-89a). The court's conclusion, in our opinion, is based on erroneous legal analysis.

1. Convenience of location is vitally important in banking, and thus the dimensions of a banking market should define an area in which the banks and their customers may easily deal with each other. *Philadelphia National Bank*, *supra*, 374 U.S. at 357-361. This ultimately is a question of the realities of trade; thus, there is no formula for mechanical definition of markets. However, for the customer who is neither very large nor very small, the limits within which banking is convenient are quite confining, and thus banking markets tend to be localized. *Phillipsburg*, *supra*, 399 U.S. at 362. The evidence shows that the Bridgeport and New Haven metropolitan areas are sections of the country in which banks and their customers conveniently interact.[47]

Although the concept of a "metropolitan area" is familiar, the precise use of the concept of Standard Metropolitan Statistical Area ("SMSA") by the Office of Management and Budget and by the Census Bureau makes it a particularly useful starting point for banking market analysis. An SMSA is an area

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[47] This Court has emphasized that "[t]his phrase does not call for the delineation of a 'section of the country' by metes and bounds as a surveyor would lay off a plot of ground." *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549.

characterized by economic and social integration as reflected in patterns of residence and employment (App. 56-57, 1435-1436). In Connecticut, an SMSA is defined as a thickly settled area consisting of a central city with at least 50,000 inhabitants, and surrounding towns linked to it (App. 1436). The measure of linkage between core city and surrounding towns is that either 15 percent of the workers living in the town work in the central city, or that 25 percent of those working in town live in the central city (App. 1435-1436).

The metropolitan area concept thus is wholly practical. It is built on an examination of where people live and work. By directing attention to commuting patterns, the SMSA points in the proper direction for sound market analysis. As Dr. Murphy, an expert in banking economics, testified, commuting patterns are "the kind of patterns, living patterns and transportation patterns that determine [customer] alternatives" (App. 124).[48]

The strength of commuting patterns in the Bridgeport and New Haven metropolitan areas is evident from the unquestioned figures supplied by the Cen-

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[48] The utility of the SMSA concept in directing attention to the area of convenient customer alternatives that makes it important, at the same time makes irrelevant the criticism (Motion To Affirm, p. 27) that the concept does not include banking data and was not developed as a tool for banking analysis. The "town" concept, on which defendants place great emphasis (Motion To Affirm, pp. 20-25), similarly was not developed as a tool for banking analysis and does not include banking data.

sus Bureau. Of the 146,596 workers living in the Bridgeport metropolitan area and reporting their place of work, 121,178, or 82.7 percent, work within that area (computed from App. 1442). Of the 129,810 workers living in the New Haven metropolitan area and reporting their place of work, 112,599, or 86.7 percent, work within that area (computed from App. 1444). Similarly, although Bridgeport and New Haven are barely twenty miles apart, only 5,769 persons residing in the Bridgeport SMSA work in the New Haven SMSA; and only 6,911 residents of the New Haven SMSA work in the Bridgeport SMSA (computed from App. 1442, 1444).

Data from the defendant banks further confirms that the Bridgeport and New Haven SMSAs are areas within which the sellers and buyers of banking services can conveniently deal with each other. Most of the customers at Connecticut National and First New Haven offices within the Bridgeport and New Haven SMSAs come from those SMSAs (App. 1513-1540).[49] For example, the vast majority of demand deposit accounts in Connecticut National's main office are from the Bridgeport metropolitan area: 90.9 percent by number of accounts, 85.9 percent by dollar volume (App. 1513). First New Haven's main office also draws most of its demand deposit accounts from the New Haven metropolitan area: 85.1 per-

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[49] Connecticut National operates 25 offices in the Bridgeport metropolitan area; First New Haven operates 17 offices in the New Haven metropolitan area (App. 1816-1817; 1872-1873).

cent by number of accounts, 79.4 percent by dollar volume (App. 1528).

The branches in the suburbs show a similar pattern. Connecticut National's Fairfield office draws 84.4 percent of its demand deposits and loan business from customers with addresses in the Bridgeport SMSA (computed from App. 1519); and First New Haven's Hamden office receives 88.7 percent of its demand deposits and 83 percent of its loan business from customers resident in the New Haven SMSA (computed from App. 1536).

2. The district court's reasons for concluding that, despite this extensive proof, the government had failed to show that the Bridgeport and New Haven SMSAs are relevant sections of the country, are legally erroneous.

The district court's primary reason was that "the appropriate section of the country for the purposes of this case is the state of Connecticut as a whole" (J.S. App. A, p. 89a). However, as we have shown (see pp. 28-31, *supra*), this is legally insufficient under the standards set forth in *Philadelphia National Bank*, *supra*, for it is based on an erroneous seller-oriented market analysis. Such analysis, which also finds expression in two of the district court's other reasons relating to system-wide pricing (see J.S. App. A, p. 89a, Nos. 3 and 4), is just as improper a method of determining whether the Bridgeport and New Haven metropolitan areas are relevant sections of the country as it is of appraising the state as a whole.

The other reasons advanced by the district court are also legally deficient. That the government did

not show "the percentage of residents in any Connecticut SMSA who are customers within the same SMSA" (J.S. App. A, p. 88a) puts an unnecessary and unjustified burden of proof upon the government. The government did establish that a large majority of persons working in each metropolitan area also live in the area, that there is very little commuting between metropolitan areas, and that banking offices in each area do the great bulk of their business with residents of the area (see pp. 36-38, *supra*). The logical inferrence from these facts is that most residents of a metropolitan area bank within that area. To demand that the government reduce this to percentages is to require a definition of the market by "metes and bounds"—a standard which this Court has explicitly rejected. *United States* v. *Pabst Brewing Co.*, *supra*, 384 U.S. at 549.

The district court's reliance upon the supposed failure of the other banking regulatory agencies to analyze the proposed merger "in terms of the SMSA concept" (J.S. App. A, p. 89a) involves errors of fact and law. Since in all bank merger cases the district court is required to make a determination of the issues *de novo*, the advisory reports of agencies, rapidly prepared and without the benefit of discovery,[50] ordinarily are of little significance in evaluating

[50] The Comptroller wrote to the agencies concerning the proposed merger on February 3, 1971. The Department of Justice reported on March 29, 1971 (App. 1618); the Federal Deposit Insurance Corporation reported on May 20, 1971 (App. 1627); the Federal Reserve Board reported on March 12, 1971 (App. 1630).

the evidence at trial—although the agencies' unanimous conclusion that the merger would be anticompetitive is entitled to some weight, as this Court held in *Philadelphia National Bank, supra*, 374 U.S. at 361-362 and *Phillipsburg, supra*, 399 U.S. at 364.

Although it cited no authority, the district court here apparently meant to analogize what it thought was agency unanimity of omission of the metropolitan area concept to the unanimity of mention of the market recognized by this Court in *Philadelphia National Bank* and *Phillipsburg*. The analogy fails, however, because the district court made a plain error of fact when it asserted that none of the agencies analyzed the merger in terms of the metropolitan area concept.

The Federal Reserve Board in fact analyzed this merger in terms of metropolitan areas. The findings upon which the district court relied for a contrary conclusion (J.S. App. A, p. 19a, Nos. 61, 62) do not even mention the Federal Reserve Board. In fact, the Board's report (App. 1630-1633) makes frequent reference to the Bridgeport and New Haven "markets," and although it does not use the acronymn "SMSA," there can be no doubt that the Board was using the concept of metropolitan area when it spoke of "markets". This is so not just because of the general context, but because of the virtual identity of market share figures computed by the Board for the leaders of the Bridgeport and New Haven "markets" and the figures used by the government for leaders of these "SMSAs"—in each case about 39 percent (compare App. 1630-1631 with App. 1545, 1548).

Another erroneous ground for the district court's rejection of the Bridgeport and New Haven metropolitan areas was its reliance upon rejection of the SMSA concept by the court in *United States* v. *Provident National Bank*, 280 F.Supp. 1(E.D. Pa.) (J.S. App. A, p. 89a). This argument, which the defendants embellish by contentions of government inconsistency with positions taken in *Philadelphia National Bank* and *Phillipsburg* (Motion To Affirm, pp. 27-28), is unsound because it ignores the teaching of this Court that market definition depends not on rigid legal rules but on ascertainment of the competitive realities of trade. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336-337; *Phillipsburg*, *supra*, 399 U.S. at 362. The SMSA concept is a useful tool for banking market analysis, but it is only a tool, and its value will vary from case to case.

Thus we do not contend that an SMSA is *ipso facto* a banking market, and we realize that, although some SMSAs may be congruent with banking markets, others might be so large that submarkets exist within their contours, and yet others might be too small. Each case must turn on its own facts. The facts show significant differences between the Bridgeport and New Haven SMSAs and those involved in earlier cases, and there is nothing improper or inconsistent with precedent in claiming that in the present case the Bridgeport and New Haven metropolitan areas are congruent with banking markets.[51]

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[51] *Phillipsburg* is not even remotely apposite, for the question of the validity of an SMSA as a banking market was not

Finally, the district court's statement that "meaningful banking alternatives" are available beyond the confines of each metropolitan area, and its finding that only 57 percent of Connecticut National's business comes from the Bridgeport metropolitan area (J.S. App. A, pp. 88a-89a, Nos. 2 and 5) are either irrelevant or inconsistent with the principles set forth in *Philadelphia National Bank*. Upon an examination of the underlying findings (J.S. App. A, pp. 19a-20a), these conclusions turn out to mean no more than that

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presented. The only SMSA in that area is the Allentown-Bethlehem-Easton SMSA, and the district court specifically found that it "is too large". *United States* v. *Phillipsburg National Bank and Trust Co.*, 306 F. Supp. 645, 652 (D. N.J.).

In *Philadelphia National Bank* and *Provident National Bank* this Court and the district court held that the Philadelphia SMSA, an eight-county area spanning two states and covering 3,553 square miles (*1970 Census of Population*, Volume I, Part A (Characteristics of The Population), p. 1-188), was too large an area in which to measure the competitive impact of a merger between two banks headquartered in Philadelphia. Each court accepted a smaller four-county area in Pennsylvania as the relevant section of the country. *Philadelphia National Bank, supra*, 374 U.S. at 359; *Provident National Bank, supra*, 280 F. Supp. at 6. However, the merging banks were prohibited by law from having offices in the fifth Pennsylvania county and in three counties located in New Jersey, and virtually none of their business (less than 3 percent) came from that part of the SMSA. *Provided National Bank, supra*, 280 F. Supp. at 6, n. 3. By contrast, in the present case Connecticut law applies to both metropolitan areas—which combined have an area of only 438 square miles (computed from *1970 Census of Population, supra*, at 1-187, 1-188); thus, each bank has the right to operate statewide, including the Bridgeport and New Haven metropolitan areas; and each draws a sizeable amount of business from that part of the metropolitan areas outside the center cities.

banks which operate in one or more markets have customers in one or more markets—especially very large customers. This is true, but irrelevant.

Obviously most of a bank's business will come from the area where it has most of its offices—this is the essence of the concept of "service area".[52] A service area, though it is a measure of where the bank sells its services, does not in any way indicate the convenience of the bank offices to the buyers of banking services. Convenience of buyer-seller interaction is the lesson of banking market definition taught by *Philadelphia National Bank*, where this Court held "[t]he proper question to be asked * * * is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." 374 U.S. at 357. This Court then added: "[T]his depends upon 'the geographic structure of supplier-customer relations'." *Ibid.*[53] The district court's conclusions disregard that lesson.

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[52] A bank's service area is defined by banking authorities as the region from which it derives 75 percent of its deposits (J.S. App. A, p. 20a).

[53] Defendants correctly point out (Motion To Affirm, p. 31, n. 25) that in *Philadelphia National Bank* this Court held the relevant market to be an area in which the defendants' banks had their branches. However, as this Court observed in *Phillipsburg*, the location of a bank's branches and the places from which it draws its business are important "[i]n locating 'the market area in which the seller operates' * * *." *Phillipsburg, supra*, 399 U.S. at 363. Market analysis requires attention to sellers and buyers, however. *Philadelphia National Bank, supra*, 374 U.S. at 357-361.

C. The Individual Cities And Towns In Connecticut Are Not Relevant Sections Of The Country

Defendants, after contending in the district court that the relevant sections of the country are the State of Connecticut plus New York City, or alternatively the State of Connecticut (J.S. App. A, pp. 88a, 91a),[54] now propose to this Court that "[t]he town or community is the appropriate unit for analysis of the competitive effect * * *" (Motion To Affirm, p. 28). This argument is, of course, inconsistent with the opinion of the district court, which did not determine that the individual towns are sections of the country, but to the contrary held that the State of Connecticut is the only relevant section of the country (J.S. App. A, pp. 87a-92a, 89a, 92a). It is also inadequately supported by the testimony of the defendants' witness, Dr. Peck, upon whose testimony the defendants' present argument is apparently based.

Although Dr. Peck analyzed the competitive consequences of the proposed merger in terms of individual towns, he not only recognized that no party contended that individual towns are banking markets (App. 828), but he also admitted that he had no opinion on whether or not they are markets (App. 847). Absent evidence relating to market definition, there is no reason to suppose that historical boundaries of political subdivisions are controlling for purposes of Section 7.

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[54] See Defendants' Pre-Trial Memorandum, pp. 12-14, and Defendants' Post-Trial Brief, p. 17.

III. ON THE BASIS OF OBJECTIVE EVIDENCE CONNECTICUT NATIONAL BANK IS A SIGNIFICANT POTENTIAL ENTRANT INTO THE NEW HAVEN MARKET AND FIRST NEW HAVEN NATIONAL BANK IS A SIGNIFICANT POTENTIAL ENTRANT INTO THE BRIDGEPORT MARKET

The United States contended that on the basis of objective evidence showing their economic incentive, reasonable prospects for success and financial capability, Connecticut National and First New Haven are significant potential competitors in each other's prime markets. The district court recognized that the government had presented what was at least "[o]n paper * * * a strong case" (J.S. App. A, p. 98a). We submit that the government's case was strong in fact as well as on paper, and that the court erred in not accepting it.

In bank merger cases, as in other Section 7 cases, the determination whether a firm is a significant potential entrant must be made on the basis of objective evidence showing the potential entrant's economic incentive to enter independently, its financial capability to do so, and the reasonable prospects for making such an entry successfully. As this Court stated last Term in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 533: "The specific question with respect to this phase of the case is not what * * * [the firm's] internal company decisions were but whether, given its financial capabilities and conditions in the * * * market, it would be reasonable to consider it a potential entrant into that market." As we have explained at length in our brief in the companion bank

merger case, there is every reason to apply the same standards in determining actual potential entry in banking.[55]

A. There Is Ample Incentive For Connecticut National And First New Haven To Enter Each Other's Primary Market

Ample incentive for Connecticut National to enter the New Haven market and for First New Haven to enter the Bridgeport market exists in the economic attractiveness of a nearby, important banking market with sound growth prospects. Both markets experienced significant economic growth in the two decades prior to the merger and are forecast to have further substantial growth in the years ahead. The Bridgeport area population grew by 41.1 percent and the New Haven area population grew by 30.2 percent between 1950 and 1970 (App. 1458). Projections point to continued and substantial population increase in the next decade (App. 1474). Employment and personal income, which increased in the years prior to the merger, are expected to keep increasing in the coming years (App. 1475, 1477). Moreover, this metropolitan area growth takes place in a state where per capita income is already the highest in the country (App. 2568, 2214).

The fact that economic growth in the cities of Bridgeport and New Haven, as the district court found (J.S. App. A, pp. 34a-35a), has been less rapid

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[55] Brief for the United States, pp. 36-42, *United States* v. *Marine Bancorporation, Inc.*, S. Ct. No. 73-38, copies of which have been furnished to the parties to this case.

than that in the state as a whole does not detract from the economic vitality of the metropolitan areas. Each of those cities is but a part of a separate metropolitan area banking market which has experienced consistent economic growth and for which continued growth is projected. The relevant focus of inquiry should not be on the core cities, which neither the district court nor the parties before it contended were markets, but on the metropolitan areas.

The district court's failure properly to focus on the relevant markets also led it to the erroneous conclusion that effective entry into either the Bridgeport or the New Haven metropolitan area requires entry into the cities of Bridgeport and New Haven (J.S. App. A, p. 99a). The findings for this conclusion (J.S. App. A, pp. 99a, 33a-35a) rely on the testimony of Dr. Peck. But, as we have pointed out (see p. 44, *supra*), Dr. Peck, who sought to rank commercial banks in the state as potential entrants into each principal town or city instead of into customer-supplier markets, recognized that banking markets are not confined to the boundaries of individual Connecticut towns.[56]

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[56] Actually, the findings do not even support the conclusion except to the very limited extent that Dr. Peck testified that to serve effectively "some kinds of medium-sized commercial business that are centered in Downtown Bridgeport", a bank must have an office in Bridgeport (App. 784). Dr. Peck also pointed to the importance of the suburbs as places of employment and centers of retail trade and emphasized the flexibility of commuters and suburban businessmen (App. 784, 785).

The realities of banking show that dynamic patterns of urban expansion have changed the nature of metropolitan banking markets and that core city offices are not indispensable to effective market penetration. These markets no longer stop at city lines.[57] They are defined by the area-wide interaction of banks and customers. The defendant banks conduct their business on this basis. It is for this reason that Connecticut National established 12 branches in the Bridgeport suburbs and First New Haven established 6 branches in the New Haven suburbs between 1955 and 1971 (App. 1561-1562). It is for this reason also that CBT and Hartford National, the two large Hartford banks, entered the Bridgeport market by establishment of branches in suburban Fairfield (App. 1952).[58]

The defendants do not deny that the competition of Hartford National and CBT, which both operate in the Bridgeport and New Haven metropolitan areas, stimulates their interest in seeking a broader area of operations in order to stay competitive (App. 1646, 1662-1663). Thus since banks, no less than other businesses, are attracted to new markets where economic growth offers the prospect of profit, there

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[57] Indeed, population trends, *i.e.*, suburban growth, indicate that the most attractive locations for new entry are not in the core cities but in the suburban areas of the market.

[58] Hartford National, which has only the Fairfield branch in the Bridgeport market, thus competes for business in the market from an office which is about 5 miles from downtown Bridgeport (App. 1952).

are multiple incentives for the defendants to enter each other's prime markets.

B. Effective Means For Entry Exist Through *De Novo* Branching, Toehold Acquisition, And The Formation Of A Holding Company

Effective means exist for Connecticut National and First New Haven to enter the markets which they have strong incentive to enter. Those means are the same which the banks have used successfully to enter new territory for years: *de novo* branching and toehold acquisitions.[59] Connecticut law allows branching statewide, subject to the limited restriction of home office protection, and it allows acquisition statewide without even that restriction.

The banks are thoroughly familiar with both techniques of expansion from past experience. Connecticut National led all Connecticut banks with the establishment of 34 branches between 1955 and 1971; at the same time it also acquired four banks (App. 1561-1562, 1555). First New Haven followed a similar course: between 1955 and 1971 it opened 14 *de novo* branches and acquired three banks (App. 1562, 1556).

Entry by toehold acquisition is possible in each metropolitan area. At the time of the merger, there were three banks suitable for toehold acquisition in the Bridgeport metropolitan area, including two banks

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[59] On "toehold" entry, see *The Bendix Corp.*, (FTC), 3 Trade Reg. Rep. ¶ 19,288, vacated and remanded on other grounds, *Bendix Corporation* v. *Federal Trade Commission*, 450 F. 2d 534 (C.A. 6).

with headquarters in the city of Bridgeport; and there were five such banks in the New Haven metropolitan area (App. 1510, 1545, 1548).[60] Subsequent to trial, the opening (or impending opening) of state-chartered banks in Monroe and Bridgeport added two more banks suitable for toehold acquisition.[61]

The district court's answer to the evidence on this issue—that "[n]o small banks were identified that were available for sale" (J.S. App. A, p. 101a)—is

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[60] In the Bridgeport market the Lafayette Bank & Trust Co., with five offices, four of which are in Bridgeport, has a 5.9 percent market share and total deposits of $44.5 million; James Staples & Co., with its one office in Bridgeport, has a 0.4 percent market share and total deposits of $2.1 million (App. 1510, 1545, 1550); the Bank of Stratford, with its one office, has somewhat more than 1 percent of the market and total deposits of $5.7 million (App. 1512; computed from App. 1545 and *Polk's World Bank Directory* (March 1972), Connecticut, p. 44).

In the New Haven market, the Hamden National Bank, with two offices, has a 2.9 percent market share and total deposits of $20.3 million; Community Banking Co., of North Branford, with four offices, has a 2 percent market share and total deposits of $14.7 million; Orange National Bank, with three offices, has a 1.7 percent market share and total deposits of $13.5 million; Woodbridge Bank and Trust Co., with one office, has a 1.3 percent market share and total deposits of $8.4 million; and North Haven National Bank, with two offices, has a 1.3 percent market share and total deposits of $12 million (App. 1548, 1550-1551).

[61] It is our understanding that the new state-chartered banks in Trumbull and Shelton, referred to by the defendants (Motion To Affirm, p. 19, n. 16) and the new national bank, referred to by the Comptroller (Comptroller's Motion To Affirm, p. 15, n. 9), have so far received only provisional authority and have not yet opened. Obviously, when these new, small banks open, they too will be suitable for toehold acquisition.

beside the point.[62] Banks never display "For Sale" signs, but the large number of bank mergers that have taken place in Connecticut and the rest of this country indicates that sales will be made if an attractive enough offer is made. Moreover, it is no answer to the evidence of the incentive (see pp. 46-49, *supra*) and capacity (see pp. 55-59 *infra*) of Connecticut National and First New Haven to make such an offer to the small banks in the metropolitan areas, that the government did not independently prove the interest of those banks in selling. See *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 568-569 (concurring opinion of Mr. Justice Marshall).

De novo branching offers another route by which the defendants can enter the metropolitan area markets. At the time of the merger, although the cities of Bridgeport and New Haven were closed to *de novo* branching because of the Home Office Protection Law, many of the other towns in the Bridgeport and New Haven markets were open. In the Bridgeport market, Milford, Fairfield, Trumbull, Monroe, Shelton and Easton were open to branching; and in the New Haven market, East Haven, West Haven, Branford, Guilford and Bethany were open to branching (App. 1505). The same five towns in the New Haven market are still open. In the Bridgeport market the chartering or provisional chartering of new banks in

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[62] The court also stated that "CNB was unable to negotiate the purchase of smaller banks in the past * * *" (J.S. App. A, p. 101a). This is erroneous, for the record establishes that between 1955 and 1971 Connecticut National purchased four small banks (App. 1555).

Monroe, Fairfield, Trumbull and Shelton closes those towns to branching at the same time that it opens them to entry by toehold acquisition (see pp. 49-50, *supra*).

Moreover, the defendants, like other banks in Connecticut, have a history of turning to independent entry by *de novo* branching when merger proves impossible. Thus, in 1968 Connecticut National attempted to acquire the Litchfield County National Bank in New Milford but was rebuffed: a year later Connecticut National opened a *de novo* branch in New Milford (App. 1601, 1569). In 1964 First New Haven unsuccessfully tried to acquire the Guilford Trust Company; then, in 1965 it opened a *de novo* branch in Guilford (App. 1605-1606, 1575).[63] And CBT, after abandoning its proposed merger with Connecticut National in the face of a government antitrust suit, made a competitively significant entry into the Bridgeport market and the rest of Fairfield County with *de novo* branches, which prior to the suit it had asserted it could not establish (App. 1952, 1933).[64]

Although, as the district court found (J.S. App. A, p. 7a), establishment of a branch in an open town by either defendant requires the approval of the

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[63] First New Haven had similar unsuccessful merger attempts followed by *de novo* branching in Derby and Wallingford in 1966 and 1968 (App. 1606, 1603-1604, 1575).

[64] CBT coupled its branching with toehold acquisitions (App. 1952). Connecticut National has also responded to unsuccessful efforts to acquire a larger bank by acquiring a smaller one, as happened in Stamford (App. 1601, 1553-1555).

Comptroller, the district court's conclusion that "* * * the Comptroller's present policy will not permit any significant *de novo* branch penetration by CNB into the service market of FNH, or vice versa" (J.S. App. A, p. 100a) is erroneous. The "policy" to which the court referred is not found in any statute or regulation, but rather in an unrevoked 1965 press release temporarily closing major Connecticut banking markets to new charters (App. 2573-2575). Even if one were to take this expression of policy, which does not even mention *de novo* branching, at face value, it would simply be the present view, subject to change, of an administrator who presumably will do his statutory duty of taking into account antitrust doctrine which favors *de novo* entry over entry by acquisition. See *Philadelphia National Bank, supra*, 374 U.S. at 370.[65]

Moreover, whatever the words of this policy, the facts are that the Comptroller has continued to approve branch applications in major markets all over Connecticut. Between 1966 and 1971, the Comptroller approved 78 of 86 *de novo* branch applications for Connecticut—an approval rate of 90.7 percent (App. 1954). These approvals include branches of the defendants' competitors in both the Bridgeport and the

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[65] This policy is incorporated into the Bank Merger Act to the extent that the Act reiterates Section 7 (12 U.S.C. 1828 (c) (5) (B)). See *United States* v. *Third National Bank in Nashville*, 390 U.S. 171.

The press release does not apply to acquisitions, which the Comptroller has regularly approved in Connecticut.

New Haven metropolitan areas (App. 1955-1956).[66] There is no reason to think that the Comptroller will discriminate against the defendants by barring their branching.[67]

There was yet a third method by which the defendants could make an independent entry into new markets: organization of a holding company whose agents would obtain a charter for a new state or national bank to be acquired thereafter by the holding company. It is a procompetitive way, in the words of two First New Haven executives who recommended it, of "opening closed towns" (App. 1648), especially those where there is no suitable toehold acquisition.

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[66] Indeed, it was by means of *de novo* branching, approved by the Comptroller, that Hartford National entered the Bridgeport market (App. 1952). As shown by the vigorous competition which Hartford National gives from its one branch in the suburbs to Connecticut National in this market, it is hardly necessary to blanket a market with branches to make a competitively significant entry.

[67] Similarly, there is no justification for a court, in the face of solid objective evidence of the defendants' incentive, prospects for success and capability independently to enter each other's prime markets, to give significant weight to the testimony of defendants' officers that they would not independently enter (J.S. App. A, p. 99a). As this Court has observed, the existence of potential competition cannot depend upon subjective statements of intent. *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 174, 175; *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 534-536, n. 13. In fairness to the district court, however, it appears that it may have considered this evidence no more than a makeweight (see J.S. App. A, p. 99a), hence a matter of no consequence either in its decision or in this appeal.

The holding company method is novel in Connecticut (J.S. App. A, p. 100a), for until the passage of the Connecticut Bank Holding Company and Bank Acquisition Act in 1969 (Conn. Gen. Stat. Ann., §§ 36-418 through 36-430) the legality of multibank holding companies was uncertain under state law. Their legality is now clear. Similarly, the evidence is clear, although the district court ignored it, that this means of expansion has been used successfully in several other states with home office protection laws (App. 1585-1586, 1980-1982), and that it is acceptable to the Federal Reserve Board, which administers the Bank Holding Company Act. See, *e.g.*, 37 Fed. Reg. 5981.

Thus, defendants have three available means of entry into new local markets: *de novo* branching, toehold acquisition, and formation of a holding company. Defendants are not, of course, limited to utilizing only one of these methods, and, to the extent that management wishes to enter a new market on a scale larger than one office, the result may be obtained by *de novo* branching in open towns and by either toehold acquisition or the holding company route in closed towns.

C. Connecticut National And First New Haven Have The Financial Capability Independently To Enter Each Other's Primary Market

Finally, the defendants have the financial capability to make the independent entry into each other's prime market which the law allows and which economic incentive urges. The district court's conclusion

to the contrary (J.S. App. A, pp. 99a, 101a) is the result of applying an erroneous legal standard.

Connecticut National and First New Haven are respectively the fourth and eighth largest commercial banks in Connecticut (J.S. App. A, p. 1a). Of the approximately 14,000 commercial banks in the United States, Connecticut National is the 186th largest, and First New Haven is the 268th largest (App. 688). Connecticut National is the largest bank in Connecticut not already possessing an office in the New Haven area, and First New Haven is the second largest bank in Connecticut without a branch in the Bridgeport area (App. 1506-1508).[68]

The evidence establishes that, as a result of increasing size and net income in the decade prior to the merger, both banks are strong and profitable. Between 1961 and 1970 the total resources of each bank nearly doubled, and at the same time the net income of each bank nearly tripled (see pp. 11-12, *supra*). Indeed, the district court did not contradict nor declare irrelevant this evidence of the banks' size and profitability.

Since Connecticut National and First New Haven established numerous branches and made several acquisitions when each was smaller and had smaller profits (see pp. 10-12, *supra*), the district court's conclusion that independent expansion into adjoining

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[68] This omits from consideration the First New Haven branches in Milford and the Connecticut National branch in Orange, two towns on the somewhat hazy border between the Bridgeport and New Haven areas.

markets is too expensive when the banks are bigger and more profitable quite simply does not square with the record. The district court's misunderstanding of potential competition explains this anomaly. The district court assumed that competitively significant entry into either market requires the prompt establishment of many banking offices and the rapid capture of a big market share.[29]

This assumption is really a challenge to the rationale of Section 7, which favors *de novo* entry. *Philadelphia National Bank*, *supra*, 374 U.S. at 370. The significance of potential entry is not lost merely because the potential entrant might initially make only a small entry into a market. That entrant is still a new competitive force, for whose success in the market vigorous competition is essential. There is no guarantee that the entrant, in the face of renewed competition from the market leaders, will in fact enlarge its market share, nor does this matter for Section 7 purposes: the antitrust laws protect not competitors but competition. However, it does matter that the potential for this competition be preserved, for when through merger it is lost, the loss to competition is both immediate and irremediable.

The record in this case confirms the importance of small-scale entry. The two Hartford banks, CBT and Hartford National, each entered the Bridgeport market in a modest way: the establishment of a

[29] Hence the court's emphasis on a "substantial" or "significant" amount of branching (see, *e.g.*, J.S. App. A, pp. 100a, 48a).

single branch in the suburban town of Fairfield (App. 1952).[70] Each has set out to compete from there. The record does not show how much business the Hartford banks draw in the Bridgeport market, but it shows that their competition is felt (App. 1662-1663; Motion To Affirm, p. 18).[71]

The record establishes that the defendants, too, have the resources to make a comparable modest entry into each other's prime markets. The construction of a branch costs no more than $300,000,[72] and there are banks suitable for toehold acquisition in each market (including two in Bridgeport city) that are of roughly the same size as those which CBT and Hartford National acquired to enter the Bridgeport and New Haven markets (see pp. 49-50, *supra*).[73]

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[70] Hartford National still has only that one branch; CBT some time later made a toehold entry by acquiring the defunct Columbus Industrial Bank and turning it into a competitive branch (App. 1952).

Since CBT was able to make a good toehold entry out of this defunct bank, the assertions of the defendants and the intervenor (Motion To Affirm, pp. 13, 18; Comptroller's Motion To Affirm, pp. 13-14) that First New Haven could not reasonably enter Bridgeport by acquiring James Staples & Co., a functioning bank with over $2 million in deposits, are untenable.

[71] The entry of the Hartford banks into the New Haven market was comparable, although with greater emphasis on toehold acquisitions (App. 1952).

[72] Both Connecticut National and First New Haven lease many of their branches (J.S. App. A, p. 49a; App. 957, 1055). Leasing, of course, saves investment capital.

[73] First New Haven also has the capacity to enter the Bridgeport market by acquisition of Lafayette Bank & Trust, a

The district court, having focused mistakenly on the costs of large-scale expansion, never addressed the defendants' financial capacity to expand on a small-scale. Had it done so, there can be no question that it would have found that each of these two big, sound banks, whose combined resources approach $800,000,000, can afford entry.

IV. THE EFFECT OF THE MERGER MAY BE SUBSTANTIALLY TO LESSEN COMPETITION

A. The Merger Will Eliminate Substantial Potential Competition In The Bridgeport And New Haven Markets

As shown in the discussion at pp. 46-59, *supra*, Connecticut National and First New Haven have the incentive, available means, and capability independently to enter each other's primary market. The merger, by removing these independent competitive forces, may substantially lessen competition. See Brief for the United States in *United States* v. *Marine Bancorporation, Inc. et al.*, No. 73-38, pp. 28-36, 55-56.

Bridgeport-based bank with five offices and deposits of $44.5 million (App. 1510, 1545, 1550). First New Haven acquired the New Haven Bank, a bank of virtually the same size ($42 million in deposits) in 1957, when First New Haven's resources were only $118,196,000—about one third of what they are today (App. 1556). *Moody's Bank & Finance Manual* (1958), p. 223. The district court did not deny that First New Haven could afford Lafayette, but found only that to acquire it or any other bank, First New Haven or Connecticut National would, in the exchange of shares by which acquisitions are made, have to pay a premium (J.S. App. A, p. 52a). The court did not identify this premium, let alone find it prohibitive.

B. This Merger Will Likely Trigger Other Mergers Among The Largest Banks In Connecticut And Thus Spread Anticompetitive Effects Statewide

There has been a pronounced trend in recent years toward mergers among the largest banks in Connecticut (see pp. 5-6, *supra*). Approval of this merger will almost surely accelerate that trend. Indeed, since the conclusion of the trial in this case, the third and ninth largest banks in the state have sought approval to merge (see p. 6, *supra*), and other leading banks will seek partners for "defensive" mergers (App. 615-616, 688-690). The result will be a consolidation of the ten largest banks into five or six even larger banks. This result was foreseen at trial (App. 616) and endorsed by the district court, which concluded that:

> * * * this proposed consolidation would mean more competitive choices for the people of Connecticut and a more healthy and balanced banking structure of five or six strong and relatively equal competitors [J.S. App. A, p. 64a]

This approval of "countervailing power" is the cornerstone of the district court's analysis of competitive effects, and it is contrary to the decisions of this Court and to the purpose of Section 7, which seeks to prevent rising levels of concentration.

This Court has recognized in actual competition cases that one anticompetitive result of a merger may be the inducement, or "triggering", of other mergers among major firms in an industry which lead to further concentration. *United States* v. *Continental*

Can Co., 378 U.S. 441, 464; and see *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 275-278; *Philadelphia National Bank*, *supra*, 374 U.S. at 367.

A merger between two large potential competitors can also trigger a merger trend among other large potential competitors who fear being left behind, thus multiplying the anticompetitive effects of such a merger. See, *e.g.*, *United States* v. *Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill.). Such effects are particularly grave in banking because, as we have shown, unless trends toward combinations of large banks are resisted, once they have become apparent, the state may rapidly become dominated by a few, large, statewide institutions.

This danger now exists in Connecticut. There is a discernible trend towards concentration (see pp. 5-6, *supra*). The present merger not only eliminates Connecticut National and First New Haven as potential competitors; it also encourages other leading banks toward mergers which may eliminate significant potential competition in local markets around the state. Since there are presently, at most, eight banks left in Connecticut which have the capability to become statewide banks,[14] the triggering of mergers which will remove two or three of them poses a serious anticompetitive effect.

The district court concluded that this merger could have no triggering effects, because bank mergers require regulatory agency approval, and that approval

[14] CBT and Hartford National already are statewide banks for all practical purposes.

is subject to *de novo* judicial review upon suit by the Department of Justice (J.S. App. A, p. 101a). This analysis is inconsistent with the court's endorsement of countervailing power and fails to recognize the precedential significance of the court's opinion. Its reasoning would apply with equal force to mergers between other large Connecticut banks, and neither the regulatory agencies nor the district court itself could disregard this precedent in considering future mergers in Connecticut, although the agencies would not be bound by it.

The likelihood that other mergers will be triggered is enhanced by the district court's view that this merger should be permitted because the consolidated firm will be able better to compete against the big Hartford banks (J.S. App. A, pp. 64a-67a). Not only is this reasoning at odds with a basic tenet of Section 7—see *Philadelphia National Bank, supra*, 374 U.S. at 370, where this Court rejected a similar theory of "countervailing power"—but it invites a chain reaction of "defensive" mergers which will produce exactly the further concentration of statewide banking resources which the court foresaw and favored (J.S. App. A, p. 64a). The message of the district court's opinion will not be lost on management of other large Connecticut banks, and those faced with competition from merged institutions will actively seek merger partners under the justification erroneously adopted by the district court for this merger.

C. Under The District Court's Theory That The State Of Connecticut Is The Only Relevant Market, The Merger Is Illegal Because It Would Significantly Increase Concentration In That Concentrated Market

If the district court correctly concluded that the State of Connecticut is the only relevant section of the country, then the defendants cannot be potential competitors because all banks in Connecticut are necessarily actual competitors in one statewide market. In this event, the merger must be tested under well-established Section 7 principles applicable to horizontal mergers. The district court misapplied these principles.

The defendants proposed to unite Connecticut National, with a 6.6 percent share of the statewide market, and First New Haven, with a 4.7 percent share: the result would be a new bank with an 11.3 percent market share (App. 1550).[75] The merger, moreover, would take place in a state in which there is a significant trend toward concentration. Concentration in Connecticut, measured by the shares of the top ten banks, increased from 57.8 percent in 1955 to

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[75] These are year-end 1971 figures.

The fact that the merger increased the statewide market share of the top ten banks by only about 1.8 percent, as found by the district court (J.S. App. A, pp. 44a-45a), does not indicate weak competitive impact, but simply that the bank currently the eleventh largest in the state (which would after the merger become the tenth largest) is small and has a 1.8 percent market share (App. 1550).

83.1 percent in 1971 (App. 1598).[76] This Court's decisions establish that such a merger, even after appropriate "shading" of the percentages,[77] is a violation of Section 7. *United States* v. *Von's Grocery Co.*, 384 U.S. 270; *United States* v. *Pabst Brewing Co.*, 384 U.S. 546; *Philadelphia National Bank, supra; Phillipsburg, supra.*

In *Von's Grocery, supra*, the firms whose merger was held unlawful had 4.7 percent and 4.2 percent shares of a market in which the top twelve competitors had only 48.8 percent. *Id.* at 281 (concurring opinion of Mr. Justice White). In *Pabst, supra*, the illegal merger produced a combined 4.49 percent share of the nationwide beer market, in which the ten leading sellers controlled 45.06 percent of the market. *Id.*

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[76] During the same period the combined market share of the top five banks also increased substantially: from 46.4 percent to 61.0 percent (App. 1598).

[77] See *Philadelphia National Bank, supra*, 374 U.S. at 364, n. 40. The district court appointed a special master to ascertain the amount of deposits of Connecticut residents in New York City and Boston banks (App. 2331). The master located only about $483.9 million in New York City banks and $37 million in Boston banks in 1972 (computed from App. 2346, 2353). These New York City deposits are only 7.3 percent of the roughly $6.6 billion in deposits held by Connecticut commercial banks in 1972 (computed from App. 2554). In fact, even if one shades the percentages by 10 percent, which the district court thought a not unreasonable figure (J.S. App. A, p. 42a) the combined market share of Connecticut National and First New Haven will still be over 10 percent.

Out-of-state savings banks should not be included, because, as discussed above (pp. 20-27), commercial banking is a valid line of commerce in Connecticut.

at 550-551. The merger between Connecticut National and First New Haven will thus produce a larger market share in a more heavily concentrated market than either of the mergers struck down in *Von's Grocery* and *Pabst*. And, just as a trend toward concentration is important in unregulated industries (see *Von's Grocery, supra*, 384 U.S. at 275-278; *Pabst, supra*, 384 U.S. at 552-553), a trend toward concentration like that in Connecticut is also highly relevant in appraising the competitive consequences of a bank merger. *Philadelphia National Bank, supra*, 374 U.S. at 367.

To avoid the force of these precedents, defendants argue on the one hand that the State of Connecticut is too small a market and on the other hand that it is too big. Thus they suggest here, as they contended before the district court,[78] that New York City, with its massive banks, should be included with Connecticut in one banking market. Motion To Affirm, pp. 32-34. However, this contention runs afoul of the district court's explicit conclusion that "the intervenor and defendants failed to produce the quantum of proof necessary for the Court to include New York City as part of the relevant market" (J.S. App. A, p. 92a).

Alternatively, but inconsistently, defendants argue that because the Bridgeport and New Haven metropolitan areas are separate markets the merging banks are "not 'substantial competitors'" (Motion To Af-

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[78] See Defendants' Post-Trial Brief, pp. 12-17.

firm, pp. 30, 31)."[79] This, too, requires an attack on the findings of the district court, for the district court found that the State of Connecticut is the only section of the country (J.S. App. A, pp. 89a, 21a-24a). And in so doing it further found that the state is a banking market because it is an "* * * area in which banking products or services are sold by a group of firms which *act* as though they are competing * * *" (J.S. App. A, p. 21a).[80] The defendants, of course, may agree with the United States that the State of Connecticut is not a banking market, but if they do so they must also recognize that relevant markets smaller than the whole state exist. The United States submits that the Bridgeport and New Haven metropolitan areas are such markets.

V. THE ANTICOMPETITIVE EFFECTS OF THE MERGER WOULD NOT BE CLEARLY OUTWEIGHED BY THE PROBABLE EFFECT OF THE MERGER IN MEETING THE CONVENIENCE AND NEEDS OF THE BRIDGEPORT AND NEW HAVEN AREAS

The Bank Merger Act of 1966 provides that the district courts are to test the validity of bank mergers by the competitive standards of Section 7 of the Clayton Act. It also created a new defense: whether "the anticompetitive effects of the proposed transac-

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[79] On this reasoning, *a fortiori*, New York City is not part of the relevant market.

[80] The defendants' expert, Dr. Stokes, testified in appraising concentration that the state as a whole is "* * * one of the best market[s] to be considered for this purpose" (App. 633).

tion are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U.S.C. 1828(c)(5)(B). The merging banks have the burden of proving that defense. *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 178. In bank merger cases the district court is accordingly required "to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by 'the convenience and needs of the community to be served.'" *United States* v. *Third National Bank in Nashville*, *supra*, 390 U.S. at 178.

The district court, after concluding that the merger would not have any anticompetitive effects, further held that the defendants had established that "any hypothesized anticompetitive effects of the merger were clearly outweighed by the resultant bank's increased ability to meet the convenience and needs of the community" (J.S. App. A, p. 101a). This conclusion was incorrect for two reasons: (1) the court's erroneous determination that the merger would have no anticompetitive effect necessarily undermined and invalidated its finding that any anticompetitive effects were clearly outweighed by the merger's effect in meeting community convenience and needs; (2) the benefits that the district court found do not satisfy the "convenience-and-needs" standard.

1. A proper evaluation of the "convenience-and-needs" defense can be made only after a proper eval-

uation of the anticompetitive consequences of the merger. As this Court has stated: "To weigh adequately one of these factors against the other requires a proper conclusion as to each." *United States* v. *Third National Bank in Nashville*, *supra*, 390 U.S. at 183. The district court did not reach a proper conclusion on the merger's competitive consequences, and thus it could not adequately weigh convenience and needs against them. Moreover, since the Bank Merger Act requires judicial balancing of real costs and benefits, a district court may not weigh convenience and needs against "hypothesized anticompetitive effects of the merger" (J.S. App. A, p. 101a).

2. The district court sustained the "convenience-and-needs" defense on the grounds that it would provide two kinds of benefits: (a) additional competition for the two big Hartford banks statewide (J.S. App. A, pp. 102a-103a, Nos. (1), (2), and (6)); and (b) additional services to customers and potential customers in the markets the banks presently serve (J.S. App. A, pp. 102a-103a, Nos. (3), (4) and (5)). Neither of these benefits, however, satisfies the "convenience-and-needs" defense.

a. The primary purpose of the defense was to permit a merger that would enable the merged bank to provide needed services in the community. Cf. *Phillipsburg*, *supra*, 399 U.S. at 371. The defense, however, was not intended to sanction an otherwise illegal merger of two large and healthy banks merely because the resulting bank would be able to compete better with a larger bank in the area. Still less

was it intended to permit such a merger so that the resulting bank could compete better with a larger bank outside the community which the resulting bank serves. The district court's discussion of competition under the rubric of "convenience and needs" is no more than a reintroduction of competitive issues purportedly dealt with earlier in its opinion.

b. The additional or better services that the district court concluded would justify the merger were an increased lending limit,[81] sophisticated computer and international services, corporate and municipal financing services, and trust services[82] (J.S. App. A, pp. 102a-103a, 68a-80a). Virtually the only beneficiaries of these services are very large customers—customers who are in no way limited to banking alternatives in their community. Yet the "convenience-and-needs" defense requires a showing that the services offered by the new bank are "likely to benefit *all* seekers of banking services in the community * * *." *Phillipsburg*, *supra*, 399 U.S. at 372 (emphasis added). Appellees, having presented a case based on the testimony of executives of large corporations,

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[81] Connecticut National's present limit is $2.8 million; First New Haven's present limit is $2.3 million; the bank resulting from the merger would have a lending limit of $5.1 million (J.S. App. A, p. 69a).

[82] The "trust services" referred to by the district court are not for individuals of moderate income, but rather for "[i]ndividuals whose net worth is greater than the capital of a bank", the Knights of Columbus, and "three pension plans" of a corporation with 1500 employees and annual sales of $30 million (J.S. App. A, pp. 76a-77a; App. 1286).

proved only that for such customers would the merger possibly offer any real benefits.[23] Such a showing is, as a matter of law, insufficient to establish a "convenience-and-needs" defense.

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[23] The assertion of the Comptroller (Comptroller's Motion To Affirm, p. 23) that "intervenor called seven witness [sic] representing broad sectors of the business community * * *" is erroneous. The seven witnesses and the business community they represent are: Robert J. Blinken, of Mite Corporation—annual sales around $30 million; James H. Gilbert of C. W. Blakeslee—annual sales $45 million—$50 million; William Schmiedel of M. Schiavone—annual sales $40 million—$80 million; Virgil DeChant of the Knight of Columbus—annual life insurance premium income $45 million; Leon J. Simkins of Simkins Industries—annual sales of $30 million; Frederick M. Robison of Warnaco—annual sales $300 million; and Michael F. Fountain of Armstrong Rubber—the nation's sixth largest tire manufacturer (App. 1242, 1255, 1263, 1274, 1286, 1293, 1324).

The district court's conclusion that the "merger would benefit many small businessmen as well as the large corporations" (J.S. App. A, p. 103a) is based upon findings (J.S. App. A, p. 72a, Nos. 259-260) which show that the making of big loans "to large corporations" will increase the bank's lendable funds generally because those corporations must deposit "compensating balances." But as the district court found, compensating balances amount to only 10 to 20 percent of the loans (J.S. App. A, p. 72a), and the banks, by directing their lending attention to large customers, in fact deprive average customers of millions of dollars in lendable funds (App. 1973). Moreover, on this theory, the larger the beneficiaries of the merger, the better it meets the "convenience-and-needs" defense. Congress did not intend, however, that banks could make this defense by showing the incidental spillover to average customers of indirect benefits from a merger principally and directly beneficial to large corporations. The banks made no showing that their lending limit for average customers is inadequate.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for entry of an appropriate decree.

Respectfully submitted.

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